IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 13 of 1991
With
SECOND APPEAL No. 61 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAVITABEN BHAGWANDAS PATEL & 6 - Appellant(s)
Versus
MUKUNDLAL SUKHLAL SHAH & 3 - Defendant(s)

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Appearance :
MR NAGIN N GANDHI for Appellant(s) : 1, 1.2.1, 1.2.2,1.2.3 - 7, 7.2.2, 7.2.3, 7.2.4,7.2.5 - for Appellant(s) : 7,
PARTY-IN-PERSON as Respondent : 1,
None for Respondent (s) : 2,
DELETED for Respondent (s) : 2.2.1, 2.2.2, 2.2.3, 2.2.4,2.2.5 - 4.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/09/2006

COMMON ORAL JUDGMENT

1. Second Appeal No.13 of 1991 has been filed by Savita

Bhagwandas Patel and 6 others, while Second Appeal No. 61/91 has been filed by original plaintiff Mukundblal Sukhlal Shah. It is not in dispute before me that a partnership of 12 persons was constituted long back, the plaintiff-Mukundlal S. Shah, feeling aggrieved by the action of some of the partners had filed Regular Civil Suit No. 355/62 in the court of 2nd Jt. Civil Judge [J.D.], Bhavnagar, with a submission that the partnership be dissolved with effect from 10.10.62 and a decree for rendition of accounts be granted. The defendants appeared before the Court and submitted that in view of the arbitration provision, the suit could not be maintained and was required to be stayed under Sec.34 of the Indian Arbitration Act, 1940. The Court accordingly stayed the proceedings and referred the matter to the arbitration. The arbitrators made their award in the matter. It was challenged by both the sides, therefore, the same was set aside by the Court and new set of arbitrators was appointed. The new set of arbitrators again delivered their award, this time, the plaintiff filed Regular Civil Suit No. 227/64 which was, in fact, under the provisions of Sec. 8/14/20 of the Indian Arbitration Act for making award Rule of the Court. Again, certain objections were raised, the proceedings were stayed in the

second suit also and thereafter, the award was not accepted by the parties. The parties agreed before the trial court that the arbitration agreement be superseded and the matter be proceeded with.

2. The learned trial court framed certain issues and allowed the parties to lead their evidence. When the evidence was being recorded with the consent of the parties, a Commissioner was appointed to ascertain the correctness of the accounts and find the liability of the either parties. The Comissioner submitted his report, but it was not accepted by the parties. The parties however lead their evidence.

3. After recording evidence and hearing the parties and after threadbare examination of the total evidence including the terms of the government contract, the amount received and the amount to which partners would have been entitled, the trial court granted decree in sum of Rs.58,685/- with interest. The plaintiff says that it is compound interest, while Mr. Gandhi says that the words are “Chadhtu Vyaj” would mean running interest, according to him, running interest wold be simple interest.

4. After the decree was passed, the defendants being aggrieved by the said decree preferred Regular First Appeal No. 6/82, submitting inter alia, that the suit could not be decreed. The plaintiff, still being aggrieved, filed Regular Appeal No. 26/82,

submitting inter alia, that he is entitled to a sum of Rs.1,02,50,000/- under the heads of the late payment, mental agony, loss of status, personal torture and torture to his family. It is undisputed that under any of these heads, no claim was made before the trial court. It is to be noted that the Court Officer/Taxing Officer of the learned first appellate court raised objections regarding payment of the court fee, the questions were kept open and were ordered to be decided at the time of the final disposal of both the appeals. As both the appeals arise out of the same judgment, those were heard simultaneously and thereafter, the matters were disposed of finally on 25/28.10.90, the learned appellate court dismissed both the appeals. At the same time, it directed that short-fall of the court fee be recovered from the plaintiff. The defendants being aggrieved by the dismissal of their appeal have filed Second Appeal No. 13/91 which has been admitted for hearing the parties on 29.1.91 on the following substantial questions:

1. Has the trial court, pecuniary jurisdiction to pass the decree for Rs.58,685.88, though being a junior division Judge? If not, what would be the effect?
2. Could the trial court proceed with the

suit, appoint commissioner for taking accounts, and on the basis of his report; pass decree for recovery of amount, inspite of two sets of arbitrators having rendered their two consecutive awards and placed them on record of the case, as against the provisions of sections 21,23 and 32 of the Arbitration Act, 1940? If not, what would be the effect?

3. Could the commissioner appointed for taking account, reassess and revalue the firm's construction work, and adjudicate and audit each and every item of expenditure, and arrive at probable costs of construction to assess the profit of the firm, as against actual costs of construction shown in the books of account of the firm? If not, what would be the effect in view of specific provision of section 48 of the Partnership Act, 1932?

The plaintiff being aggrieved by dismissal of his appeal has filed Second Appeal No.61/91 which has been admitted for hearing the parties on 10.6.91 on the following substantial questions of law:

1. Has the trial court, pecuniary jurisdiction to pass the decree for Rs.58,685.88, though being Junior Division Judge? If not, what could be the effect?
2. Could the trial court proceed with the suit, appoint commissioner for taking accounts and on the basis of his report pass decree for recovery of amount, in spite of two sets of arbitrators having rendered their two consecutive awards and placed them on record of the case, as against the provisions of Sections 21,23 and 32 of the Arbitration Act, 1940? If not, what would be the effect?
3. Could the commissioner appointed for taking account, reassess and revalue the firm's construction work and adjudicate and audit each and every item of expenditure and arrive at probable costs of construction, to assess the profit of the firm, as against actual costs of construction shown in the books of account of the firm? If not, what would be the effect in view of specific provision of Section 48 of the Partnership Act, 1932?
4. While assessing profit of the firm, could the commissioner ignore initial investment

by other partners to the tune of Rs. 1,40,000/- and could he consider profit of Rs. 37,000/- of Dhandhuka work done before the plaintiff joined the partnership? If not, what would be the effect?

5. Mr. Gandhi, learned counsel for the appellants firstly submitted that the trial court could not grant decree in sum of Rs. 58,685.88 ps. being a court of Civil Judge [J.D.] which had limited pecuniary jurisdiction.

6. In the opinion of this Court, the question should not detain this Court unnecessarily in view of Sec.4[i] of the Bombay Court Fees Act, 1959, which provides for valuation and payment of the court fee. It clearly provides that in suits for accounts, court fee would be payable according to the amount at which relief sought is valued in the plaint or memorandum of appeal, subject to provision of Sec.8 and subject to minimum fee of one hundred rupees. In a given case, the plaintiff may value the relief as he wants and unless the same is shown to be arbitrary, the valuation put forth by the plaintiff would be accepted by the court. It would be altogether different thing that in the final decree or at the time of rendition of accounts, it is found that the plaintiff is entitled to something much

more than what he had valued the suit for. Even in such case, the court cannot say that it would have no pecuniary jurisdiction. The first question in Second Appeal No.13/91 deserves to be answered against the interest of the defendants.

7. The question no.2 simply says that the court could not proceed with the suit, appoint Commissioner for taking accounts and on basis of his report pass decree for recovery of amount. The question submitted by the defendants is contrary to the records. The court, while proceeding with the suit, appointed Commissioner, but objections were raised by both the sides against the Report. The Court proceeded further in the matter, recorded evidence of the parties and received accounts and only thereafter, it had passed the decree. As the suit was a suit for dissolution of partnership and rendition of accounts, the trial court had jurisdiction to proceed. The question no.2 is answered against the appellants. Later part of the question simply says that two sets of arbitrators were appointed and therefore, there were two awards. I have already observed that with the consent of the parties, the awards were set aside and arbitration agreement was superseded by the court. Once the awards are set aside and the arbitration agreement is superseded, there would be no embargo in the way

of the learned trial court to proceed with the suit.

8. So far as the question no.3 is concerned, the same would not arise, because, if a Commissioner is appointed by the Court in a suit for rendition of accounts, then, the Commissioner would be entitled to take stock of the situation, take accounts, reassess and revalue the firm's construction work and only thereafter, the Commissioner can record a finding that what would be the entitlement of the plaintiff and to what extent, the plaintiff would be held entitled.

9. So far as the question no.4 is concerned, according to the defendant, the trial court or the Commissioner did not take into consideration that before joinder of the plaintiff as partner to the firm, other partners had already spent sum of Rs. 1,40,000/- and had also earned profit to the tune of Rs. 37,000/- from Dhandhuka work. In the opinion of the Court, when a person joins a partnership and his profit and loss share is determined in accordance with the terms of the partnership, then, irrespective of the constitution of the partnership, on an earlier date, the partners would be entitled to share profits in accordance with their profit and loss ratio. In the present case, if some of the partners had spent sum of Rs. 1,40,000/- before the

plaintiff joined the partnership business, then too, the plaintiff would be entitled to enjoy the profit ratio fixed at the time of his admission to the partnership. After going through the records and the findings recorded by the the two courts, I must hold that the trial court was absolutely justified in taking into consideration the total amount which was earned by the partnership firm as profit.

10. So far as the Second Appeal No. 61 of 1991 is concerned, it is to be seen that the plaintiff had not filed the suit seeking damages for late payment, sufferance of mental agony, loss to the status and torture to his person or to his family. In a given case, where the plaintiff does not come to the court with a specific pleading relating to loss or damages, then, no court would be entitled to grant relief like that. In the present matter, the plaintiff had filed the suit for rendition of accounts and dissolution of partnership. No court would be entitled to grant decree beyond the relief claimed in the suit. The trial court, on the facts was justified in granting the said decree. However, the plaintiff, for the first time made a statement before the appellate court that he is entitled to sum of Rs. 1,02,50,000/- under different heads. If the plaintiff was claiming some relief in addition to what was granted by the trial court, then, he was

required and obliged to pay court fee and to that extent, the first appellate court was justified in asking the defendant to pay the amount of court fee. A person is not entitled to walk in the court as a pleasure trip and say that even without paying court fee, he would ask the court to look into the claim and ask the court that if the claim is not found maintainable, it be rejected without payment of court fee. At this stage, the plaintiff submits that as the Court did not grant him mesne profits nor inquiry has been made under Order XX Rule 12 or Order XX Rule 18, he would not be required to pay any further court fee. At least for 20 minutes, he went on arguing that the plaintiff is to be treated as a tenant in common with the other partners and in such case, Rule 18 of Order XX would apply. I tried my best to tell the plaintiff that Rule 18 of Order XX does not apply to dissolution of partnership and to a suit for rendition of accounts, but the plaintiff, who even refused to take services of advocate at the expenses of the State, went on arguing that he must be taken to be a tenant in common and a decree under Rule 18 of Order XX ought to have been made. Present is a suit where the plaintiff is not entitled to claim any mesne profits. He would be entitled to seek interest on the amount to which he is held entitled on the date

of the dissolution of the partnership. Neither Rule 12 nor Rule 18 of Order XX would apply to the facts of the present case. Despite all this, if the plaintiff, relying upon his legal acumen starts claiming amount, then, he could face the cost. The lower court would be entitled to make recovery of the said amount of court fee from the plaintiff.

11. I must hold that the trial court was unjustified in issuing a direction to the plaintiff to make an application under Rule 12 of Order XX, because such direction would not help and assist the case of the plaintiff. The first question on which the plaintiff's appeal has been admitted is answered against the interest of the plaintiff.

12. So far as question no.2 is concerned, I must hold that the trial court so also the appellate court were justified in deciding the matter on the evidence brought before them. The question no.2 is answered against the interest of the plaintiff.

13. So far as the third question that whether the plaintiff could be asked to pay additional court fee of Rs. 30,000/- is concerned, I have already answered the question against the interest of the plaintiff.

14. So far as the question no.4 is concerned, the question virtually is amplification of the question no.1. I have already held that even if such

direction is issued by the trial court, the same is not going to make any difference in the matter.

15. The plaintiff has also referred to Sec.16 of the Indian Partnership Act to contend that as the partners had been using the trade funds for earning profit, he would be entitled to accounts from the partners up to the date of the decree. I am afraid that I cannot accept the argument in view of the language of Sec.16 of the Act. Section 16 says that where profits are earned by the partners during subsistence of the partnership by entering into competitive business against the partnership or with the help and assistance of the partnership funds, then, such partners would be liable to render accounts to the other partners. Sec.16 has nothing to do with the present case. It was repeatedly submitted, placing reliance upon various judgments of different courts that as the plaintiff is tenant in common, he would be entitled to mesne profits. I suggested to the plaintiff that a partnership gives rights in accordance with the shares held by its partners and if the partnership takes some property on lease, then, the partnership becomes a tenant and if the partnership does not have any immovable property, then, principles of tenant in common or joint tenants would not apply. To my misfortune, the plaintiff is not ready and willing to understand

what the Court suggests to him.

16. The plaintiff also says that in view of the admissions made by the defendants that they had been earning 18% interest, he is entitled to compound interest at the rate of 18%. In my opinion, admission made by the defendants is not so. Even otherwise, according to the plaintiff, partnership stood dissolved with effect from 10.10.62. If the recoveries are to be decided as on 10.10.62, then, the liability of the firm or other partners would be crystalized on 10.10.62. In the present matter, the court had accepted the words of the plaintiff and had granted decree for recovery of the money. The trial court, so also the first appellate court have given perfect reasons to arrive to a finding that the plaintiff would be entitled to a sum of Rs. 58,658.88 ps. with interest.

17. So far as the question of compound or simple interest is concerned, I inquired from some of the lawyers sitting in the Court, because, I am not accustomed to Gujarati. The lawyers say that “Chadhtu Vyaj” would mean compound interest. I will accept the words of others in precedence to what the defendants say that it would amount to simple interest. Even otherwise, in a case like present, where the partnership was created in the year 1957, it continued to work for five years, stood dissolved

on 10.10.62 and the plaintiff is still running from pillar to post for more than 44 years and has lost all his life into the litigations, he must be held entitled to 9% compound interest. Even if I accept the word of Mr. Gandhi that “Chadhtu Vyaj” would mean simple interest, then too, I would be entitled to make amends in the decree by directing that the plaintiff, looking to the plight suffered by him and high-handedness of the defendants who had been dragging him from one litigation to another, must be held entitled to compound interest at the rate of 9%.

18. Both the appeals are dismissed. Separate decrees be framed accordingly. If the plaintiff files execution for recovery of money, the trial court shall see that no unnecessary objections are allowed, no delays are made in recovering the money from the partnership and the plaintiff should be allowed to see the final results of the litigation and the fruits to which he is held entitled under the judgment of the courts.

[R.S. GARG, J.]

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